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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LOUIS GUGLIELMI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does a work which is alleged to be obscene appeal to the prurient interest in sex as this Court has defined that phrase if it has no tendency to arouse sexually but has "the capacity to attract individuals eager for a forbidden look"?

II. Is a sentence of 25 years imprisonment imposed on a 55 year old first offender for the crime of interstate shipment of obscene films which involved no children, which were not displayed to unconsenting adults, and which were shipped interstate pursuant to repeated orders placed by the FBI so disproportionate to the crime that it violates the Eighth Amendment's ban on cruel and unusual punishment?

III. Did Congress intend and, if so, does the Constitution permit, imposition of consecutive sentences based on several

interstate shipments of obscene films where the several shipments were made pursuant to multiple order for the films placed by the FBI?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. V:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...nor be deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. §1465:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> The transportation as aforesaid of two or more copies of any publication or two or more of

any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

18 U.S.C. §1462:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce --

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful --

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both for each such offense thereafter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 819 F.2d 451, and is set forth in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 21, 1987. (A-1) The order denying the petition for rehearing and suggestion for rehearing en banc was entered on July 1, 1987. (A-24-25) By order dated August 6, 1987, the Honorable William H. Rehnquist extended the time for filing the petition for a writ of certiorari to and including September 29, 1987. (A-26)

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner is presently serving a 25-year sentence following conviction on obscenity charges. As the proprietor of a Baltimore, Maryland business which distributed films, magazines, books and sex aids to adult bookstores, Petitioner sold and shipped merchandise, including three short films depicting acts of bestiality, to the New Freedom Adult Bookstore in Charlotte, North Carolina. After arresting the bookstore's proprietor, the FBI learned that the films had been purchased from Petitioner. Then, posing undercover as the owners of another North Carolina adult bookstore, FBI agents began placing orders with Petitioner for sexually-oriented merchandise, including bestiality films. Pursuant to those FBI orders, on three occasions Petitioner shipped bestiality films

to the FBI in North Carolina. Petitioner was later indicted in the Western District of North Carolina.

The 11-count indictment charged five paired counts of interstate transportation of obscene films (18 U.S.C. §1465) and use of a common carrier to transport those films (18 U.S.C. §1462), and one count of conspiracy to commit those crimes (18 U.S.C. §371). The conspiracy count and four of the substantive counts were based on the shipment of the three films to the New Freedom bookstore.

The remaining six counts were based on the three shipments made pursuant to the orders placed by the undercover FBI agents. A total of eight films, all depicting various acts of bestiality, were involved.

At his jury trial, Petitioner defended on the ground that the films were not obscene. His defense was that the films neither

appealed to the prurient interest of the average, adult member of the general community nor to the prurient interest of the deviant group of zoophiliacs. The prosecutor argued that the films could be obscene even if they did not appeal to the prurient interest of anyone; in the government's view it was sufficient if they were "an appeal to" or were "directed toward" the prurient interest. The trial court, throughout trial and in its instructions to the jury, adopted the government's position.

Petitioner was convicted on all counts. The sentencing judge paired the five sets of interstate shipment/common carrier counts and sentenced Guglielmi to six five-year terms, five of which were to run consecutively. In other words, he imposed a total sentence of 25 years incarceration. He also imposed a $35,000 fine.

On appeal to the Fourth Circuit, Petitioner contended that the prosecutor had failed to prove -- and the jury instructions had failed to require that the jury find -- that the films "appeal to the prurient interest" as that phrase had been defined by this Court. He also argued that the sentence imposed was so disproportionate to the crime -- especially in light of the government's role in placing repeated orders for the films and thus inducing Petitioner to make multiple shipments which served as the basis for consecutive sentences -- that it constituted cruel and unusual punishment proscribed by the Eighth Amendment.

The Court of Appeals affirmed the conviction and held that the films had properly been found obscene. That Court held that a work appeals to the prurient interest even if it does not have the capacity to

arouse sexually as long as it has "the capacity to attract individuals eager for a forbidden look."

The Court of Appeals also rejected Petitioner's Constitutional challenge to his sentence. It noted that it was concerned about the length of the sentence imposed. (A-22) However, it held that Eighth Amendment proportionality analysis applies only to sentences as or more severe than life imprisonment without possibility of parole, and that Petitioner's 25-year sentence was thus immune from Constitutional challenge. It did not hold that the sentence ws proportional to Petitioner's crimes.

The Court denied a petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS -- WHICH DEFINES "APPEAL TO THE PRURIENT INTEREST" AS "THE CAPACITY TO ATTRACT INDIVIDUALS EAGER FOR A FORBIDDEN LOOK" -- REPRESENTS A SERIOUS DEPARTURE FROM THIS COURT'S RULINGS WHICH CAREFULLY DEFINE THAT WHICH IS OBSCENE

The decision of the Court of Appeals, by redefining "appeal to the prurient interest," substantially expands the scope of that which is obscene and thus unprotected by the First Amendment. The sole contested substantive issue in this case was whether the eight films were obscene under the first prong of the tripartite test of Miller v. California, 413 U.S. 15 (1973). Under that test, material is not obscene unless "taken as a whole, [it] appeals to the prurient interest [in sex]." Id. at 24. Based on this Court's obscenity decisions, the defense took the position that,

to appeal to the prurient interest, material must evoke or be capable of evoking a sexual response in the average member of the community or, if directed toward a deviant group, in the average member of the deviant group. The prosecution urged that the material need not be capable of evoking a sexual response on the part of anyone and that it need not "appeal to" anyone's prurient interest. According to the prosecution all that is necessary is that the material be "an appeal to," that is, be "directed toward" a prurient interest in sex. The trial court adopted the prosecution's position. On appeal, Petitioner urged this was error.

The Court of Appeals for the Fourth Circuit rejected the defense position, but went even farther than the prosecution had urged. It held that material may be obscene even though it incites no sexual response in

anyone. The Court of Appeals held that material appeals to the prurient interest within the meaning of Miller if it has "the capacity to attract individuals eager for a forbidden look." (A-14)

In so ruling, the Fourth Circuit disregarded the relevant case law of this Court and adopted a wholly novel and unprecedented definition of appeal to the prurient interest, a definition flagrantly at odds with that adopted by this Court.

The Court of Appeals was not writing on a clean slate. This Court has defined the concept of "appeal to the prurient interest." It is material which arouses a sexual response, and does so excessively, morbidly, or shamefully. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Roth v.

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United States, 354 U.S. 476, 487 n.20 (1957); Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482-87 (1962).

The question of whose prurient interest in sex must be considered in determining whether a particular work is obscene has also been addressed by this Court. In Roth v. United States, supra, 354 U.S. at 490, the Court approved a jury instruction which explained:

> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. (emphasis added)

This Court has carved out only one exception to the "average person" rule. That is the rule of Mishkin v. New York, 383 U.S. 502 (1966), a case involving depictions of various "deviant" sexual practices. The

defendant had argued that the materials did not appeal to a prurient interest of the average person in sex; instead of stimulating the erotic, they would disgust and sicken. This Court rejected the argument:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.

Id. at 508.

The decision of the Court of Appeals rejects this whole body of case law. Instead, based solely on a Comment to Tenative Draft No. 6 of the Model Penal Code (1957), it defines appeal to the prurient interest as a reference "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look." (A-14) Reliance

on this language was completely unjustified[1] and serves to distort the entire body of obscenity jurisprudence carefully developed by this Court.

The laws against obscenity exist, at least in part, in recognition of the fact that obscene materials have the capacity to do something: to arouse or excite or stimulate sexually in an unhealthy, morbid, or excessive way. A central justification for obscenity law is its perceived or assumed effect on human beings and on their behavior. Accordingly, it is reasonable to suggest that materials which are so repulsive that they do not excite, arouse, or stimulate sexually are outside the scope of obscenity regulation. Nor does that mean that the more repulsive a

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[1]Although the Roth Court did quote approvingly from Tentative Draft No. 6, it did not quote, or endorse, this language relied on by the Court of Appeals. See Roth v. United States, 354 U.S. at 487 n.20.

work is, the less likely it is to be obscene. This is because the law recognizes and takes into account the existence of deviant sexual groups whose members are sexually aroused by materials which the general, "normal" adult heterosexual population would find bizarre or repulsive -- not erotically exciting -- and the law recognizes that such materials may be obscene based on their effect -- their ability to arouse -- members of the deviant group. Thus, contrary to the Fourth Circuit's view, acceptance of this Court's decisions and the defendant's thesis based on them does not mean that "the more repulsive, the less obscene."

The test adopted by the Court of Appeals to avoid the perceived, but largely non-existent, problem is one which was never urged by the government and never before adopted by this or any other court.[2] Furthermore, if, as

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[2]If it is to become the law, principles of due
(footnote continued)

the Court of Appeals apparently believed, the Miller test is inadequate to deal with the kind of vulgar material at issue in this case, then it is important for this Court to address the problem.

The Court of Appeals for the Fourth Circuit, perhaps unwittingly, has made major changes in a very sensitive area of First Amendment jurisprudence. Because its decision redefines an essential element of obscenity, and conflicts with the definition adopted by this Court, the petition for a writ of certiorari should be granted.

(footnote continued from previous page) process and fair notice require that it be adopted prospectively, and not applied retroactively -- and without notice or opportunity to be heard -- against the Petitioner. Application of the new rule to Petitioner's case is particularly unfair because part of his defense at trial rested on his contention that these bizarre films appealed to the sense of curiosity, and not to "the prurient interest." To redefine prurient interest to mean something akin to curiosity -- eagerness for a forbidden look -- is thus grossly unfair.

POINT II

THE RULING OF THE FOURTH CIRCUIT -- THAT ONLY SENTENCES AS OR MORE SEVERE THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE ARE SUBJECT TO PROPORTIONALITY REVIEW UNDER SOLEM v. HELM -- IS CONTRARY TO THE EXPRESS COMMAND OF SOLEM AND IN CONFLICT WITH THE RULINGS OF THE OTHER COURTS OF APPEAL

Noting that it was "concerned" about the sentence imposed, the Court of Appeals for the Fourth Circuit nevertheless ruled that only sentences as or more severe than life imprisonment without possibility of parole are subject to proportionality review under Solem v. Helm, 463 U.S. 277 (1983). (A-22-23) That decision is directly contrary to this Court's mandate in Solem. In that case this Court squarely held that the Eighth Amendment prohibits prison sentences that are disproportionate to the crime committed. Specifically, the Solem Court held that a life

sentence without possibility of parole imposed under a state recidivist statute for a seventh non-violent felony offended the Eighth Amendment.

The Solem Court noted that reviewing courts should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes and to the discretion that trial courts possess in sentencing convicted criminals. Accordingly, it stated that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Id. at 290 n.16. But the Court also made clear that "no penalty is per se constitutional." Id. at 290 (emphasis added).

Solem neither states nor suggests that the proportionality requirement of the Eighth Amendment applies only to prison terms of life without parole. On the contrary, the decision made clear that it applies to all punishments.[3]

The Solem Court also established the analytical framework for review of sentences claimed to be disproportionate and identified three objective factors to be considered by

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[3]Nor does this Court's failure to overrule Rummell v. Estelle, 445 U.S. 263 (1980), or Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), support the Fourth Circuit's ruling. The Solem Court said that Hutto v. Davis makes clear that Rummell should not be read to foreclose proportionality review of sentences of imprisonment.

> Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court -- like the dissent today -- offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual setting.

Solem v. Helm, supra, 463 U.S. at 303 n.32.

the reviewing court. First, the gravity of the offense and the harshness of the penalty must be examined. Second, a comparison of the sentences imposed on other criminals in the same jurisdiction may be undertaken. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." Id. at 291. Finally the court may compare the sentences imposed for commission of the same crime in other jurisdictions. The framework is a general one, applicable on its face to all sentences which might be imposed.

Every Court of Appeals other than the Court of Appeals for the Fourth Circuit has accepted -- and applied -- the plain teaching of Solem v. Helm. While those courts have frequently upheld lengthy sentences against Eighth Amendment disproportionality

challenges, and many have done so without extended analysis, all have recognized that term-of-years sentences must be proportionate to the crimes for which they are imposed and have applied the criteria set forth in Solem for testing proportionality. See, e.g. Tuitt v. Fair, Slip. op. 86-1808 (1st Cir., June 4, 1987); United States v. Ortiz, 742 F.2d 712 (2d Cir.), cert. denied, 105 S.Ct. 573 (1984); United States v. Rosenberg, 806 F.2d 1169 (3d Cir. 1986); Whitmore v. Maggio, 742 F.2d 230 (5th Cir. 1984); Foots v. Louisiana, 793 F.2d 610 (5th Cir. 1986); Chandler v. Jones, 813 F. 773 (6th Cir. 1987); United States v.Mitchell, 788 F.2d 1232 (7th Cir. 1986); United States v. Sato, 814 F.2d 449 (7th Cir. 1987) (fine); United States v. Eggleton, 799 F.2d 378 (8th Cir. 1986); United States v. Terrovona, 785 F.2d 767 (9th Cir. 1986); United States v. Hack, 782 F.2d 862 (10th Cir. 1986); United

States v. Darby, 744 F.2d 1508 (11th Cir. 1984); cf. United States v. Holland, 810 F.2d 1215 (D.C. Cir. 1987). Only the Fourth Circuit has read Solem v. Helm to foreclose proportionality review of sentences of terms of year.

The Fourth Circuit's ruling is especially troublesome for several reasons which make this case particularly appropriate for consideration by this Court.

First, if the sentence imposed here is subjected to proportionality review under Solem v. Helm's analytical framework, its unconstitutionality seems clear. Obscenity offenses involving consenting adults are widely viewed as not particularly serious.[4]

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[4]The study of the population's view of the comparative seriousness of 140 different crimes cited by this Court in Solem ranked an obscenity offense (sale of pornographic magazines) as less serious than 127 of the other crimes studied, including driving while a license is suspended, refusal to make

(footnote continued)

The State of North Carolina itself, the jurisdiction into which the films were shipped, classifies the crime of selling obscene matter as an offense against public morality and decency. This is a "Class J" felony, the least serious felony recognized under North Carolina law, punishable by a

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(footnote continued from previous page) essential repairs to rental property, passing worthless checks of less than $100, and soliciting for prostitution. See Rossi, Waite, Bose & Berke, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 228-29 (1974). Other measures of gravity also demonstrate the relative lack of seriousness of obscenity crimes. The obscenity offenses of which Petitioner stands convicted were non-violent and victimless. No minors were involved, and no participant was coerced or subjected to duress of any kind or even involuntarily exposed to any offensive matter. Even the Parole Release Guidelines of the United States Department of Justice assign violation of federal obscenity statutes an offense severity rating of "Category 3," on a scale where Category 8 is the most serious, and Category 1 is the least. 28 C.F.R. §2.20 (1985).

maximum term of imprisonment of three years. See N.C. Gen. Stat. §14-190.1 (1985 Cum. Supp.).[5]

The sentence Petitioner is serving -- a term of a quarter of a century -- is undeniably severe.[6] Counsel believe that it

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[5]Although the states deal with obscenity offenses in a variety of ways, most jurisdictions treat obscenity crimes as relatively minor.

[6]To be sure, under current Parole Release Guidelines, Petitioner would be eligible for parole after completing one-third of his 25 year term, that is, after eight and one-third years. But the fact that every federal offender, even those sentenced to life, is eligible for parole consideration after 10 years or less suggests just how severe his sentence is. See 18 U.S.C. §4205.

The sentencing judge insured that Petitioner would not be released on parole before serving eight and one-third years by refusing his request that he be sentenced pursuant to 18 U.S.C. §4205(b)(1), which would have made him eligible for release earlier.

According to the Parole Release Guidelines, an adult offender incarcerated for a Category 3 offense would be expected to serve somewhere between ten months and 32 months prior to release. An offender like

(footnote continued)

is far harsher than any sentence ever imposed for violation of state or federal obscenity laws. Moreover, it is seriously out of line with sentences actually imposed for other offenses of much greater seriousness. Indeed, the 300 month sentence imposed on Petitioner is far longer than the average sentence imposed by federal judges on persons convicted of kidnapping, murder and rape.[7]

(footnote continued from previous page) Petitioner whose parole prognosis characteristics are "very good" would be expected to serve between ten and 14 months. See 28 C.F.R. §2.20 (1985). The sentence imposed on Guglielmi insures that he will not be considered for release before serving 100 months.

[7]See Sourcebook of Criminal Justice Statistics 1984, U.S. Department of Justice, Bureau of Labor Statistics at 576, Table 5.16, which shows the following average sentences, in months, for selected offenses.

First degree murder	182.9 months
Burglary	103.8
Embezzlement	32.8
Income Tax Fraud	26.3
Counterfeiting	37.8
Rape	115.0

(footnote continued)

Second, the government's role in causing a series of offenses on which consecutive sentences were imposed makes the sentence particularly problematic and open to question under the Constitution. See infra, Point III.

Finally, if the sentence imposed here is beyond judicial review under the Eighth Amendment, then there will necessarily be a chilling effect on conduct protected by the First Amendment. Few persons will run the risk of a 25 year sentence -- or one of 35 or 45 or 55 years -- for dealing in sexually explicit non-obscene material which may be found by some jury, somewhere, to be legally obscene.

(footnote continued from previous page)

Bribery	33.2
Gambling and lottery	24.8
Perjury	40.6
Kidnapping	236.2

Accordingly, this case is appropriate for certiorari on several grounds. The judgment of the Court of Appeals is in apparent conflict with a recent ruling of this Court. If left to stand, there will be a conflict among the Circuits on an important Constitutional question which affects the rights of virtually every defendant sentenced for a crime. If the Court of Appeals is wrong, Petitioner is entitled to a judicial determination, under the rule of Solem v. Helm, as to whether his sentence is proportional to his crimes. If it is not, he is serving a sentence which the Constitution forbids. Finally, if left standing, the judgment will chill the exercise of protected First Amendment rights.

No judge has suggested, and no court has held, that Petitioner's sentence is properly proportional to his crimes. Accordingly, the

writ of certiorari should be granted and, at the very least, the case should be remanded to the Court of Appeals with directions that it determine whether the Petitioner's sentence is proportional to his crimes.

POINT III

CONGRESS DID NOT INTEND AND, EVEN IF IT DID, THE CONSTITUTION DOES NOT PERMIT, IMPOSITION OF CONSECUTIVE SENTENCES BASED ON SEVERAL INTERSTATE SHIPMENTS OF OBSCENE FILMS WHERE THE SEVERAL SHIPMENTS WERE MADE PURSUANT TO REPEATED ORDERS FOR THE FILMS PLACED BY THE FBI

Incarceration for fifteen years of the 25 year sentence in this case was imposed as punishment for three interstate shipments of films made pursuant to three different orders for the films placed in a six-week period by the FBI. Petitioner contends that, in enacting the obscenity laws, Congress did not intend to allow cumulative punishments for a single course of conduct like that here which is split into, and charged as, separate crimes only as a result of the conduct of the FBI. Moreover, Petitioner maintains that, even if

Congress did intend such a result, the Constitution's Fifth and Eighth Amendments would not permit it.

As this Court has repeatedly noted, the first step in assessing the permissibility of cumulative punishments for related crimes is determining whether Congress has authorized such punishments. See, e.g., Albernaz v. United States, 450 U.S. 333 (1981); Whalen v. United States, 445 U.S. 684 (1980); Bell v. United States, 349 U.S. 81 (1955).[8]

Petitioner contends that Congress did not intend to permit the pyramiding of penalties that was done here. Unlike the lengthy sentences authorized, for example, under the continuing criminal enterprise statute, this

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[8]While initially a matter of statutory construction, even this question is of Constitutional magnitude for the Double Jeopardy Clause prevents a sentencing court from prescribing greater punishment than the legislature intended. See Missouri v. Hunter, 429 U.S. 359, 366 (1983).

is not a case in which Congress specifically authorized lengthy prison terms to deter very serious, but very lucrative, criminal conduct. In addition, there is surely no reason to believe that Congress contemplated or intended to permit federal agents to place repeated orders for materials they believed to be obscene and, by so doing, to increase the defendant's exposure at will, and without limit, without the possibility of judicial review. But that is precisely the import of the Fourth Circuit's ruling in this case. Although the question was raised in that court, it did not address the question whether Congress ever intended to permit the imposition of lengthy, consecutive sentences for Petitioner's course of conduct.

In any event, even if Congress intended to allow the imposition of multiple consecutive sentences for what is essentially

a single crime violating a single societal norm, Petitioner maintains that the Eighth and Fifth Amendments to the Constitution would not permit it. See O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (Field, Harlan, and Brewer, JJ., dissenting; consecutive sentences totalling more than 54 years for 307 counts of unlawfully selling intoxicating liquor violate Eighth Amendment; majority did not reach the issue on ground that it was not presented for review). See also Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 Yale L.J. 916 (1958).

Where the sentences are imposed for crimes committed as a result of governmental overreaching in the placing of repeated orders, and based on the prosecutor's charging of those crimes as multiple offenses, they may also violate the due process requirement of

fundamental fairness. Cf. Hampton v. United States, 425 U.S. 484, 491 (Powell, J., concurring); id. at 495 (Brennan, J., dissenting) (1976); United States v. Russell, 411 U.S. 423 (1973).

These important questions of statutory construction and of Constitutional rights which have implicitly been answered in the negative by the Fourth Circuit's decision to let the sentence stand are also worthy of consideration by this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: New York, New York
September 29, 1987

A P P E N D I X

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5255

United States of America,
Appellee,

-versus-

Louis Guglielmi,
Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge. (C-CR-85-59)

Argued: July 16, 1986 Decided: May 21, 1987

Before ERVIN and WILKINSON, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Alan M. Dershowitz (Victoria B. Eiger; Nathan Z. Dershowitz; Dershowitz & Eiger, P.C.; Harold J. Bender; Louis Sirkin; Sheldon H. Braiterman; Braiterman & Johnson, P.A. on

brief) for Appellant; Debra J. Stuart, Assistant U.S. Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

Guglielmi was convicted upon multiple counts of an indictment charging interstate transportation of obscene films and use of a common carrier for interstate transportation of the same films. His first, and perhaps principal, argument is essentially that the materials are so disgusting and repellent that they could not be found to appeal to the prurient interest of the average person, nor to the average zoophiliac. The latter branch of his contention is premised upon his subordinate contention that there is no such thing as an average zoophiliac. The argument is not without ingenuity, but we reject the

notion that greatly offensive material has the protection of the First Amendment while less offensive material does not.

I.

Guglielmi was the operator of a warehouse in Baltimore, Maryland from which he supplied adult bookstores with films, written materials, pictures and sexual aids and devices. The operator of such a bookstore from Charlotte, North Carolina was arrested, and the FBI became interested in some films found there which included scenes of bestiality. The operator of the bookstore said that he had purchased those films from Guglielmi.

Thereafter, an FBI agent, operating undercover, ordered more of such films from Guglielmi and received them in Charlotte upon the conclusion of shipments from Baltimore.

Guglielmi was indicted in the Western District of North Carolina. The first count charged him with conspiring with the owner of the Charlotte bookstore and the owner's son to ship obscene materials in interstate commerce. The next ten counts were in five pairs. The first of the pairs charged aiding and abetting interstate transportation of a named film or films in violation of 18 U.S.C.A. §1465 (1984); the second of the pair charged him with the use of a common carrier for the interstate transportation of the same film or films in violation of 18 U.S.C.A. §1462 (1984).

A jury convicted him on all counts. After pairing the counts for sentencing, the district court imposed a five year sentence on the conspiracy count and five years on each of the paired transportation counts. Only the first two were to run concurrently while the

remainder were to run consecutively, to make a total sentence of twenty-five years. It also imposed fines totaling $35,000.

II.

The parties have presented this case as if all of the portrayals in the eight named films are bestial. Actually that is not the case. We are informed that in six of the eight films there are portrayals of a variety of sex acts among humans. In one of them, entitled "Snake Fuckers," for example, use of what appears to be a live eel is only one of many incidents. As the film opens, a young woman is shown handling what appears to be a large live eel that she drops on the floor. An older woman appears and the two remove each other's clothing and perform cunnilingus. The younger woman then inserts the eel into the vagina of the older woman. She moves it back and forth. There is a film break, and the eel

is then shown inserted in the woman's anus while another object has been inserted in the woman's vagina. The two objects are moved back and forth in their separate orifices.

There is a film break and the two women, now clothed, and a man are shown seated at a kitchen table while frying on the kitchen stove are what appears to be cut up pieces of eel. The man suddenly rises and displays his erect penis. The older woman performs fellatio upon him while the man and younger woman disrobe and touch busy tongues together. The man and the older woman are then shown engaged in vaginal intercourse. The man withdraws in time to spray his ejaculate partly into the open mouth of the woman and partly upon her face and breasts. The woman then licks the head of the penis clean.

Two of the films are exclusively bestial.

In "Horny Boar," a young woman in a short dress teases a boar. The boar persistenly seeks to raise the back of her skirt with his snout, though the skirt falls back each time. Finally, the woman removes her dress and panties and assumes a submissive crouching position on the straw covered floor. A second woman throws a rough cloth on the shoulders and upper back of the crouching woman to provide some protection from the boar's pawing hooves. The boar mounts her and she reaches back with her right hand to guide his penis into her vagina. When the boar is finished, the woman climbs over a pile of baled hay and leaves the scene as the boar looks eagerly after her. Later the woman returns. This time with little ado she takes the submissive crouching position. The boar mounts her, and again she reaches back with her right hand to

guide his penis. When done, the boar falls off to one side in apparent exhaustion or relaxation.

The other film, "Horsepower," displays two naked woman massaging a small pony's penis with their hands and mouths. One woman then positions herself beneath and beside the pony and directs the pony's penis to her genitals. There is little doubt that some touching occurs, but because of the awkwardness of the position, there is some doubt about vaginal penetration. A large dog then appears. The woman fondle and manipulate his penis. They then have vaginal intercourse with the dog in two different positions.

This is enough, perhaps, to demonstrate Guglielmi's proposition that the films are absoultely disgusting, but it should also demonstrate that there is support for the testimony of the government's expert witness

that each of the films would have an appeal to the prurient interest of an otherwise sexually normal person. Some men will find sexual degradation of a woman titillating, while the prurient interest of some males may be aroused by explicit portrayals of a woman's genitals during lesbian activity.

There is a reference in the record by the defendant's "sexologist" to a film showing the insertion of comparatively large objects, a fist and a beer can, into a woman's vagina, though she thought that the film had scientific value in its demonstration of the elasticity of the vagina.

The government's expert also expressed the opinion that the films would appeal to the prurient interest of a deviant sexual group known as zoophiliacs, people who fantasize about sex acts with animals.

III.

At the trial, there was much bickering between the prosecutor and defense counsel about the prurient interest branch of the Miller v. California, 413 U.S. 15 (1973), test. It was the position of the defense that the prurient interest branch could be satisfied only if the material appealed to the prurient interest of the average person in the sense that the average person viewing the material would experience sexual arousal. The prosecutor thought it enough that the material was "directed to sexual arousal," and the district court formulated the question as being whether the material was an appeal to prurient interest. This, Guglielmi contends, was reversible error since it permitted the jury to find the films obscene without finding that the average person would experience sexual arousal upon seeing them.

One of the defendant's expert witnesses testified that zoophiliacs are not fungible. Their fantasies are animal specific. One whose fantasies are about sexual activity with one animal would not be sexually aroused by portrayals of sexual activity involving any other animal. On the basis of that testimony, Guglielmi contends that there is no such thing as an average zoophiliac, and that the sub-groups are so small no finding of obscenity can be based upon a finding of prurient appeal to zoophiliacs.

IV.

The test prescribed by Miller v. California is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct...;

and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller, 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)). The focus here is upon the first branch of the three part test, for there is no doubt that the films here are patently offensive and have no redeeming social value. It bears reminder, however, that material is not obscene unless it is patently offensive.

The average person comes into the test not as the object of the appeal but as its judge. It is he, not the most prudish, who applying contemporary community standards, determines whether or not the work appeals to the prurient interest. There is no explicit requirement that the average person determine that the material appeals to the prurient

interest of the average person. If that there the case, the average juror would answer the question by assessing his own reaction.

Doubtless there is an objective component in the test. In Regina v. Hicklin, [1868] L.R. 3 Q.B. 316, obscenity was judged by its effect upon the most susceptible persons. That approach was rejected in Roth v. United States, 354 U.S. 476, 488-89 (1957). Obscenity may not be so lightly found. The effect upon less susceptible persons must be put in the balance. As the offensiveness requirement in the Miller test is more than minimally met, however, the greater the number of people who would react to the material with revulsion and disgust. Surely Guglielmi is right that the reaction of most people of these films would be one of rejection and disgust, not one of sexual arousal, but that cannot lead to the conclusion that the most

offensive material has constitutional protection while less offensive material does not. In other contexts, one may find many references to the prurient interest of the average person, such as in Roth's rejection of the Hicklin test, id. at 489-90, but such references do not convert into a rule that if the material is so offensive as to be more disgusting to the average person than appealing to his prurient interest, it may not be found to be obscene. See Mishkin v. New York, 383 U.S. 502, 508-09 (1966).

Tentative Draft No. 6 of the Model Penal Code, quoted in Roth, had it right. In rejecting the tendency to corrupt or debase or arouse lust tests, it defines appeal to the prurient interest as a reference "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look." Model Penal Code §207.10(2) comments,

at 10 (Tent. Draft No. 6, 1957). Those individuals need not all be average persons. See Pinkus v. United States, 436 U.S. 293, 301-02 (1978); Hamling v. United States, 418 U.S. 87, 128-30 (1974).

Material that provokes "only normal, healthy sexual desires" is not obscene. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). It is obscene only if it appeals to or provokes a prurient interest. Such an interest was referred to in Roth as a "shameful or morbid interest in nudity, sex or excretion." Roth, 354 U.S. 487 n.20 (quoting Model Penal Code §207.10(2) (Tent. Draft No. 1957)). Many persons, perhaps most persons, having a normal, healthy interest in sex would have no shameful or morbid interest in nudity, sex or excretion. To meet the definition of obscenity, material must appeal to such a shameful or morbid interest and also be

patently offensive. The average person would view such materials with an intellectual curiosity, the defendant's expert witnesses agree, but not experience a whetting of sexual appetite. So much may be conceded, but if it appeals to those "individuals eager for a forbidden look," it meets the prurient interest requirement of the Miller test.

For these reasons, we reject the defendant's contention that material may not be found to be obscene unless it excites the sexual drive of the average person. The more offensive the material, the greater will be the number who would react to it with revulsion, but, as one commentator has observed, "[N]either the Supreme Court nor the legislature intended that tasteful pornography be suppressed while distasteful pornography remains unregulated." F. Schauer, The Law of Obscenity, 102 (1976).

To the extent that United States v. Treatman, 524 F.2d 320 (8th Cir. 1975), may be read as supporting the defendant's contention, we are unpersuaded by it. We simply cannot acccept the proposition that the First Amendment lends no protection to offensive material but envelops the most offensive within its protective wings.

For the same reasons, the district court was not required to ask the jury to find whether there was such a thing as an average zoophiliac and the appeal of the films to such a person. See Pinkus, 436 U.S. at 302; Hamling, 418 U.S. at 128-29. The jurors viewed the films, and, with such help as the expert witnesses provided, were competent to make the proper determination.

V.

Before trial, the defendant made a motion for recusal of the judge under 28 U.S.C.A. §455(a) (West Supp. 1987), and now appeals from the denial of that motion.

The motion was based upon remarks made by the judge while imposing a sentence upon a pornographer in an earlier case. The films in that case were particularly vile and repulsive. In imposing sentence, the judge made it clear that he regarded the distribution of such material as a serious offense against society. The judge had been exposed to those films in his judicial capacity, however, and it is entirely appropriate for a judge, when imposing a sentence, to comment upon the nature and gravity of the offense. See United States v. Carmichael, 726 F.2d 158, 160 (4th Cir. 1984).

This case is wholly unlike Berger v. United States, 255 U.S. 22 (1921). In that case in the World War I era the defendant, who was of German descent, was charged with violations of the Espionage Act. In an earlier case the judge, Kennesaw Mountain Landis, had expressed himself as greatly doubting the loyalty of every German-American. The Supreme Court held, of course, that he should have recused himself in the Berger case. The earlier public expression warranted a reasonable belief that the judge was prejudiced against any German-American who might be brought before him upon charges of violations of the Espionage Act. Here, there is nothing to indicate a predisposition on the part of the judge to believe that Guglielmi was guilty of the offenses with which he was charged. A general expression by a judge when sentencing a defendant to a term in prison

that the crime of which he stands convicted was a serious one does not disqualify the judge from presiding in later cases involving defendants charged with similar offenses.

VI.

A few days before the trial was to commence, the district judge signed an order that the voir dire of the jurors would be conducted by the judge and the parties would have the right to propose questions to be asked of the jurors. Though the usual practice of most of the district courts in this circuit is to have the judge conduct the voir dire, the usual practice in the Western District of North Carolina is to have the voir dire conducted by the lawyers. The order in this case was said to have been justified by an interest in efficiency to enable the court to reach and dispose of another case.

We see no abuse of discretion by the district court. The defendant has no vested interest in the use of any particular procedure in voir dire. United States v. Brunty, 701 F.2d 1375, 1378 (11th Cir.), cert. denied, 464 U.S. 848 (1983).

The defense proposed a large number of questions, and the district judge used most, but not all, of them. He did not inquire of the jurors about their personal attitudes toward specific sexual practices.

We find nothing inherently unfair in the voir dire. The jurors were asked a great many questions designed to disclose their associations and general attitudes. The declination by the district judge to ask the jurors about their personal reactions to specified sex acts was well within the court's

discretion. See Hamling, 418 U.S. at 138-40; see also United States v. Martin, 773 F.2d 579, 584 (4th Cir. 1985).

VII.

Finally, the defendant complains about the twenty-five year sentence imposed upon him. He seeks to have this court conduct a proportionality analysis of it and find that it is so disproportionate as to amount to cruel and unusual punishment in violation of the Eighth Amendment.

This panel is concerned about the sentence. The sentence is within the statutory limits, but the judge ordered that the sentences on the five paired counts run consecutively. Those counts were based upon separate shipments of the offensive films, and some of those shipments were instigated by the

FBI. An even greater number of offenses might have been charged had the FBI not discontinued its ordering of new films when it did.

Guglielmi had been in the business for a number of years, but he had never been convicted of any offense.

A panel of this court has recently held, however, that Solem v. Helm, 463 U.S. 277 (1983), does not require a proportionality review of any sentence less than life imprisonment without possibility of parole. United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 106 S.Ct. 2916 (1986). This panel has no authority to overturn Rhodes or to depart from its holding. Only the en banc court may do that.

VIII.

Finding no error, the conviction is affirmed, and we decline to review the sentence.

AFFIRMED.

FILED Jul 1 1987
US COURT OF APPEALS
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5255

United States of America,

Appellee,

-versus-

Louis Guglielmi,

Appellant.

O R D E R

Upon consideration of the petition for rehearing, there having been no request for a poll of the court on the suggestion of rehearing en banc, and with the concurrence of Judge Ervin and Judge Wilkinson,

IT IS ORDERED that the petition for rehearing be, and it is hereby is, denied.

/s/ Clement F. Haynsworth, Jr.
Clement F. Haynsworth, Jr.
United States Circuit Judge

July 1, 1987

SUPREME COURT OF THE UNITED STATES

No. A-103

LOUIS GUGLIELMI,

Applicant,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 29, 1987.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 6th
day of August, 1987.